

Response to Hate Crime and Public Order (Scotland) Bill – Freedom of Expression

February 2021



BEAUIS
Empowering Scotland's Ethnic and
Cultural Minority Communities

The Stage 1 Report on **The Hate Crime and Public Order (Scotland) Bill** acknowledged:

*“The Committee is of the view that there is a strong case to be made for treating race differently in relation to offences of stirring up racial hatred provided for at Section 3(1)(b). The historic nature of racial hate crime and the relative volume of offences is justification for this approach. In this respect, we agree with conclusion of the Cabinet Secretary”.*¹

- BEMIS Scotland continue to support this position in relation to the Stirring up of Racial Hatred offence and its Freedom of Expression engagement.
- **The 1986 Public Order Act Stirring up of Racial Hatred offence is well established both in terms of its application as a protection against racial hatred and in its relationship with convention rights.**
- We welcome the Government and committee’s agreement with this position and the maintenance of the insulting threshold reflecting the specific nature and types of crime captured in the stirring up of racial hatred offence.
- There is an established consensus evident in the stage 1 report and evidence received from Race Equality organisations and others such as Murray, Blackburn Mackenzie, and the Equality Network as to the long-standing specificity of stirring up of hatred in regard to Race.
- **Importantly, our members and network, the people whom this bill is being drafted to protect, have expressed no appetite for a change in their legal protections, thus we cannot support any amendments that include Race in a new freedom of expression clause.**
- BEMIS Scotland believe the consolidation aspiration of **Bracadale** is met by containing all of the aggravations and stirring up offences in the one place, but we do not believe it is necessary to treat every single characteristic in the exact same way in so far as freedom of expression is concerned. Bespoke responses are required, and this is reflected in the maintenance of the ‘insulting’ threshold creating a clear distinction between Race and the other characteristics. We do not perceive this to mean or intend to convey that we are top of a hierarchy of hate crime, just that we are equal but different. It is a matter of fact that racially

1

aggravated hate crime dominates the annual publication of hate crime figures, but this does not negate the shared experience of isolation, fear and alarm that accompanies all forms of hate crime.

- **The definition of Race covering ‘Colour, nationality, ethnic and national origin’ reflects the international consensus encapsulated in the International Convention on the Elimination of All forms of Racial Discrimination and outlined in Article 1 of the Convention.²**
- These broad provisions of protection from racial discrimination reflect a reality that racism is a ubiquitous global challenge to which we must remain vigilant. To this day, people across the world face persecution, inequality and death on the basis of the provisions of colour, nationality, ethnic or national origin and Scotland/UK is not unique in facing these challenges.
- Based upon the text of the **1986 Public Order Act**, the **European Court of Human Rights** has adjudicated on the admissibility of Freedom of Expression in relation to the stirring up of racial hatred³. Thus, we have no appetite and there is no beneficial or constructive need to deviate from a body of jurisprudence and text that has been firmly established and can be successfully integrated into Scotland’s Hate Crime Bill.
- A potential test case to check the thresholds of ‘abusive, threatening or insulting’ communication in relation to ‘discussion or criticism’ of Race would be a counter intuitive outcome to a bill seeking to protect people from racist hate crime. It is a step and a risk that we do not believe is worth taking.
- As such, our position is that **Race should be excluded from any Freedom of Expression Clause as it does not need to be there, and the risks of its inclusion substantially outweigh its benefits.** The aim of legislation is to protect people and not merely to make things neater on paper or stimulate unnecessarily debating points.
- Given the international profile of Race and the presence of racism across jurisdictions, Scotland should be mindful of the socio/political message that may be interpreted from moving away from an established

² 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

³ <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-67632%22%5D%7D>; SECOND SECTION DECISION AS TO THE ADMISSIBILITY OF Application no. 23131/03 by Mark Anthony NORWOOD against the United Kingdom

anti-racism norm developed over 34 years of the stirring up of racial hatred offense. Permitting 'discussion and criticism' of race even if having no material impact on the lives of citizens in Scotland/UK may be utilised by more hostile jurisdictions to justify regressions in the provisions of racial protection.

- On Freedom of Expression more generally and in relation to the other characteristics, there may be lessons learned from the experience of Race over the last 34 years that has not highlighted significant FOE concerns. The text in the 1986 Public Order Act Stirring up of Hatred offence which offers protection to people from wrongful prosecution outlines:

A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.

- BEMIS Scotland's general preference to freedom of expression challenges is to re-affirm the positive rights and responsibilities that are contained within **Article 10 of the ECHR**⁴. Freedom of expression is fundamental to a democratic society and robust debate and critique of various ideologies and beliefs that co-exist within our country must be allowed to take place in a transparent, inclusive, and respectful way.

⁴ The European Convention of Human Rights: 10. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.*